IN THE SUPREME COURT OF THE UNITED STATES

No. A-56

SIDNEY GREENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIM H. PEARMAN
7080 Hollywood Boulevard
Suite 120
Hollywood, California 90028
(213) 466-4525

Attorney for Petitioner

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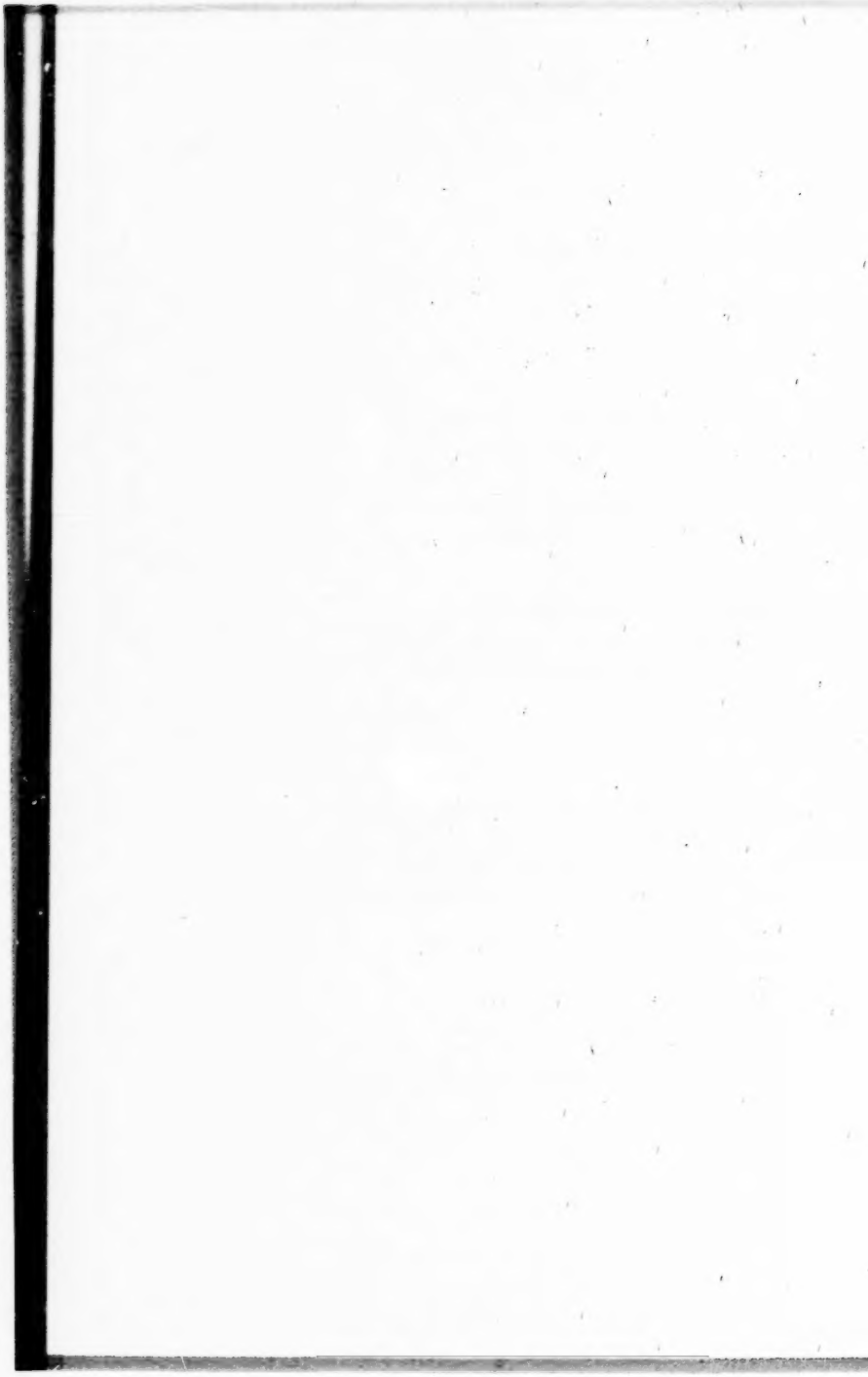

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. A-56

SIDNEY GREENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

The Petitioner filed a claim for administrative settlement with the Veterans Administration Office of the General Counsel under the Federal Tort Claims Act (Title 28, U.S.C. §1346) on August 19, 1969. Said Tort claim was denied on February 13, 1970. Suit was thereafter filed against

the United States of America in the United States District Court for the Central District of California on August 10, 1970. The cause was bifurcated and tried solely on the issue of the statute of limitations in the United States District Court and on November 3, 1972, an order was entered by said Court dismissing Petitioner's suit on the ground that it was barred by the two year statute of limitations (Title 28 U.S.C. §2401(b)).

Notice of Appeal from said order was filed by Petitioner in the Court of Appeals for the Ninth Circuit on December 11, 1972 (Title 28 U.S.C. §1291). On May 21, 1974, the United States Court of Appeals for the Ninth Circuit filed its decision affirming the judgment of the United States District Court, Central District of California. (A copy of said opinion is attached hereto as Appendix "A")

On August 16, 1974, the Honorable William O. Douglas extended the time for filing a Petition for Writ of Certiorari in this cause to and including October 18, 1974.

This Petition for Writ of Certiorari is made pursuant to Title 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petitioner was discharged from military service in 1948 with a 30% service-connected disability for nervousness (R.T. 47).

In 1961, the Petitioner's service-connected disability was reduced to zero percent and he commenced treatment at the neuro-psychiatric clinic in 1961 periodically until 1966. (R.T. 48-49)

Between 1964 and 1966 Petitioner had severe abdominal pains and bleeding and lots of anxiety. He voiced his complaints to Mr. Weinberg, a social worker, Dr. Joseph

Heller, Psychiatrist, and Dr. Drake, all Government employees. (R. T. 49, 50, 51)

On January 18, 1966, Dr. Heller, the Government Psychiatrist, arranged to have a barium x-ray of the Petitioner taken (R. T. 51).

A few days after the barium x-ray had been taken, Petitioner called Dr. Heller on the phone with severe abdominal pain and Dr. Heller mailed Petitioner some Darvon (R. T. 52, 53).

On January 26, 1966, Petitioner received a letter from Dr. Heller dated January 25, 1966 (Petitioner's Exhibit 1) stating in effect that Dr. Heller had received the report of the x-ray and "although there was a slight inflammation, there was no evidence of any tumor or ulceration and so there was nothing to cause the Petitioner concern."

At the time Petitioner received this letter he was in severe pain and bedridden

and couldn't walk (R. T. 55). Thereafter, he was admitted to the Wadsworth Veterans Hospital February 3, 1966, on a stretcher and unable to walk (R. T. 56).

On February 4, 1966, Petitioner was advised by Dr. Gordon, a Government Physician at Wadsworth that Petitioner had a bulging mass and abscess which might be diverticula. Dr. Gordon stated that the January 18, 1966 x-ray had been negative and "that it was impossible for diverticula to show up, since the x-ray was negative" (R. T. 57).

Petitioner had a subsequent conversation with Dr. Morgan, also a Government doctor at Wadsworth and was told that if any diverticula had appeared on the x-ray, since Petitioner had been complaining of pain, that Dr. Morgan was certain that Dr. Heller would have ordered additional tests (R. T. 58).

Dr. Kajiama, also a Government doctor at Wadsworth told Petitioner that diverticulitis was

just like appendicitis with the same symptoms and although they won't show up on an x-ray, they could flare up at any time. Kajiama assured Petitioner that the x-ray had been negative (R. T. 58).

These conversations with Government doctors occurred "almost constantly" from February 3, 4, 5, 6, 7, 8, where Petitioner was assured that his x-ray had been negative (R. T. 58).

Petitioner had a second barium x-ray at Wadsworth Hospital on February 7, 1966 (R. T. 57) which revealed diverticulitis and which thereafter resulted in seven surgeries and Petitioner's ultimate discharge from Wadsworth in July, 1969 (R. T. 59, 60).

In June, 1968, while in Wadsworth Hospital for his sixth surgery, Petitioner became curious as to whether or not he would need another colostomy and at 3:00 o'clock in the morning took his records from the nurses' station into the men's room to

read them (R. T. 88).

The records revealed to Petitioner that the initial January 18, 1966 barium x-ray was positive and revealed evidence of diverticulitis (R. T. 88). Since the x-ray radiologist's report was not in the file, Petitioner figured that the x-ray report would be in Dr. Heller's possession at the psychiatric division on Broadway (R. T. 89).

Petitioner secretly obtained his records and had them xeroxed and returned the originals (R. T. 90). The x-ray report (Petitioner's Exhibit 14) dated January 18, 1966, indicated the presence of diverticula and recommended "clinical correlation."

Petitioner's Exhibit 4d which Petitioner had first seen at Wadsworth in June, 1968, revealed in a Doctor's Progress Note bearing the date February 9, 1966, that the "x-rays from Veterans Administration

regional office revealed diverticulitis" (R. T. 88). Further, Petitioner's Exhibit 13 which was part of Petitioner's Hospital Summary from Wadsworth which Petitioner had seen at the same time stated: "...Following his admission, the films of the previously taken barium enema were evaluated and these revealed diverticulitis..." See also Petitioner's Exhibit 14.

Petitioner testified that he had trust and confidence in the professional ability of Dr. Heller as well as Dr. Gordon, Dr. Morgan, and Dr. Kajiama (R. T. 94) until June, 1968, when he read his file and discovered the true situation.

Petitioner did not file his federal tort claim until August 19, 1969, two weeks after his seventh and last surgery at Wadsworth and his discharge for fear of reprisals against him by the Government (R. T. 96, 97).

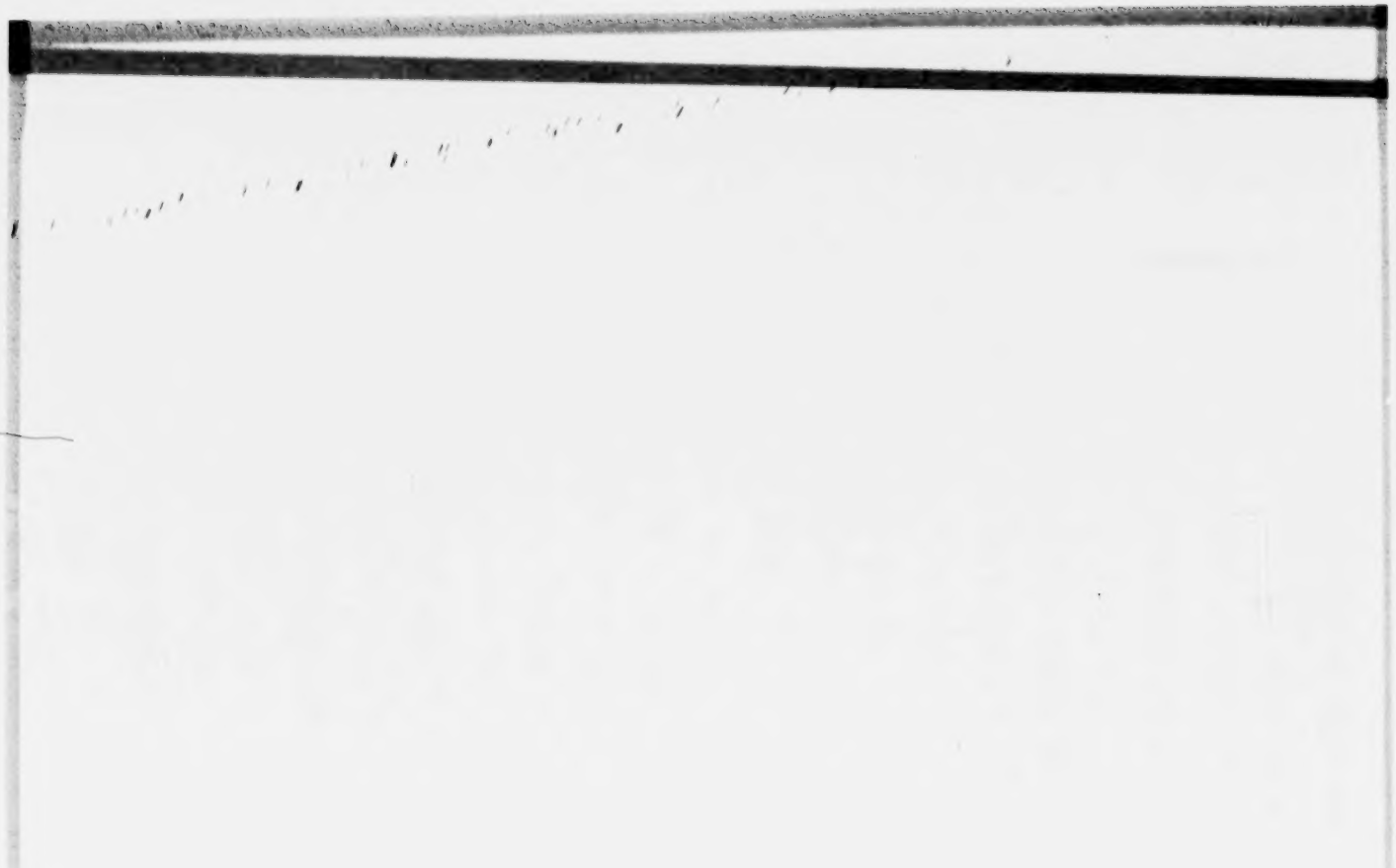
The original x-ray (i.e. January 18,

1966) had been told to Petitioner by three doctors that it was negative. A year and a half later Dr. Heller had told Petitioner his x-ray had shown nothing (R. T. 108).

Only in June, 1968, did Petitioner upon reading his medical records discover for the first time that his x-ray (January 18, 1966) had been positive for diverticulitis (Petitioner's Exhibits 4d and 13).

The Government introduced Exhibits 10-A (statement dated May 18, 1966); Exhibit A (Letter dated October 7, 1966); Exhibit B (Letter dated February 28, 1967); and Exhibit C (Letter dated July 22, 1967) in an attempt to show that Petitioner was aware of facts sufficient to put him on notice that there had been malpractice committed by agents and employees of the Government.

The Petitioner testified as to what he was attempting to accomplish by his letters.



Basically, the Petitioner in his running feud with the Adjudication Division of the Veterans Administration was attempting to service-connect a nervous condition to diverticulitis to increase his service-connected disability rating. (R. T. 63-86)

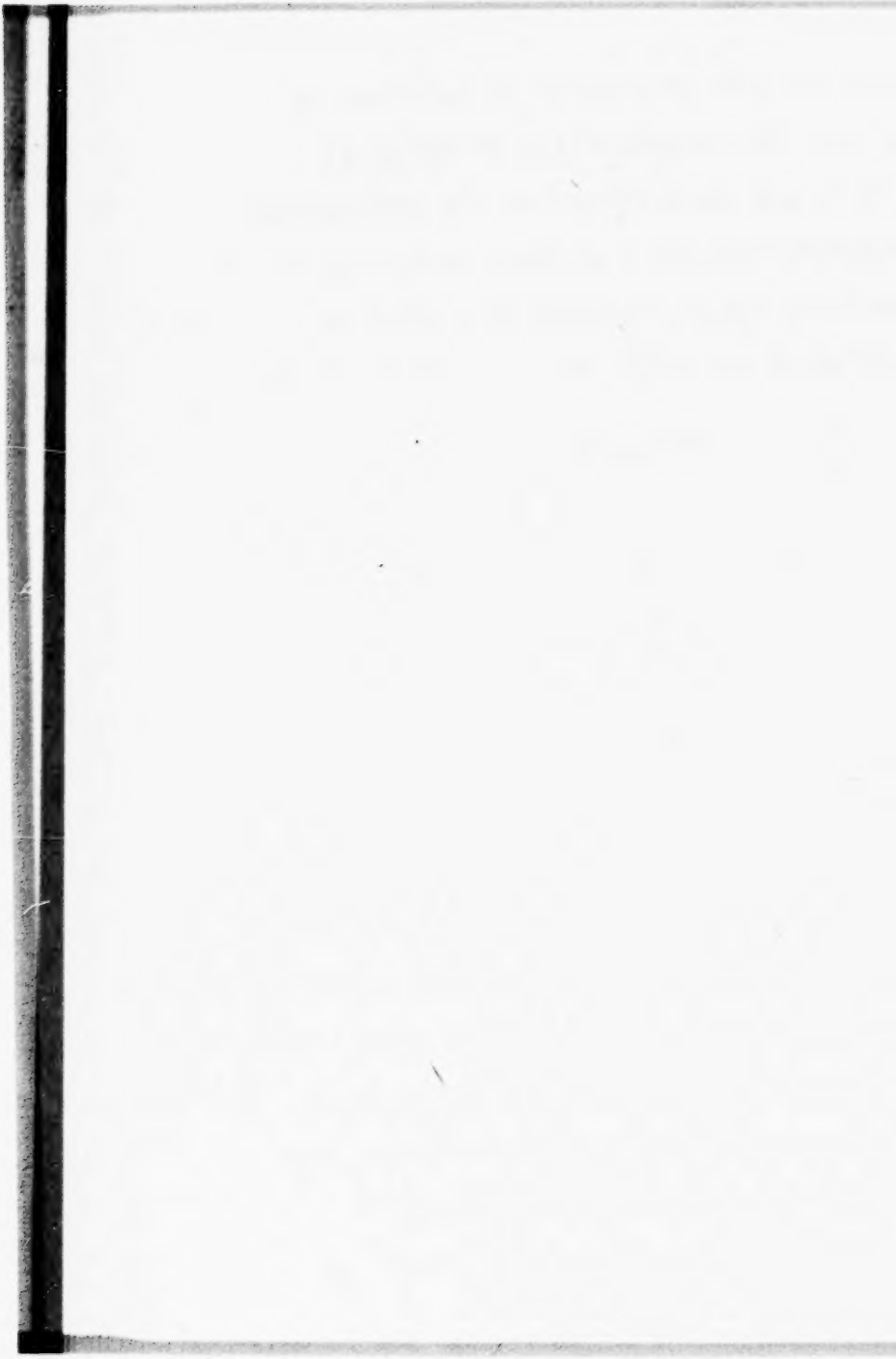
ARGUMENT

I

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON A FEDERAL QUESTION

Continuous treatment tolls the Statute of Limitations under Title 28 §2401(b).

The Statute of Limitations under the Federal Tort Claims Act (28 U.S.C. §§1346(b), 2401(b) and 2671-2680) is set forth in §2401(b) which provides in part that . . . "A tort claim against the United States shall be forever barred unless action is



begun within two years after such claim accrues. . ."

> "In a cause of action founded on alleged medical malpractice, it is incumbent on the trier of fact to determine the point in time when the 'claim accrues.' In making such a determination, principles of federal law, not state law, are to be applied . . ." Ciccarone v. United States, 486 F 2d 253, 256 (3d Cir 1973) See also: Toal v. United States, 438 F 2d 222, 224 n 3 (2d Cir 1971).

A claim for malpractice "accrues" against the Government when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice. Quinton v. United States, 304 F 2d 234, 240 (5th Cir 1962). See, e.g. Toal v. United States, 438 F 2d

222, 224-225 (2d Cir 1971); Ashley v. United States, 413 F 2d 490, 492 (9th Cir 1969).

The limitation period as set forth is not tolled during the time of a claimant's minority. Brown v. United States, 353 F 2d 578 (9th Cir 1965); Pittman v. United States, 341 F 2d 739 (9th Cir 1965), cert denied 382 U.S. 941, 86 S Ct 394, 15 L Ed 351. It is not tolled in favor of a minor Indian who is a ward of the Government, Mann v. United States, 399 F 2d 672 (9th Cir 1968). The pendency of a workman's compensation claim will not toll the statute of limitations. Mendiola v. United States, 401 F 2d 695 (5th Cir 1968).

There are instances where the statute will be tolled: "Blameless ignorance" on the part of the claimant will justify the tolling of the statute. Urie v. Thompson, 337 U.S. 163, 170; 69 S Ct 1018, 93 L Ed 1282 (1949). The continuance of the physician-patient relationship will toll the statute. See, e.g.

Ashley v. United States, 413 F 2d 490 (9th Cir 1969); Brown v. United States, 353 F 2d 578 (9th Cir 1965).

The decisions of the federal courts of appeals are in conflict as to whether or not "continuous treatment" will toll the statute of limitations under Title 28 §2401(b). Petitioner urges this ground to secure a review of his case. Avco Corp v. Aero Lodge, 390 U.S. 557, 20 L Ed 2d 126, 88 S Ct 1235 (1968); Pennsylvania Nat. Bank v. United States, 387 U.S. 213, 18 L Ed 2d 726, 87 S Ct 1573 (1967).

> ". . .Because of an acknowledged conflict between the decision of the Third Circuit in this case and that of the Seventh Circuit in United States v. Citizens National Bank of Evansville, (citation omitted), we (United States Supreme Court) granted cer-

tiorari . . ." See, Pennsylvania Nat Bank, supra, (18 L Ed 2d 730).

In Petitioner's case the federal statute involved (Title 28 §2401(b)) will continue to give rise to conflicting interpretations in the courts of appeals unless certiorari is granted to resolve the conflict, which resolution is important in the administration of the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2401(b) and 2671-2680).

The Second Circuit Court of Appeals in Kossick v. United States, 330 F 2d 933, 936 (2d Cir 1964), cert den 379 U.S. 837, 85 S Ct 73, 13 L Ed 2d 44 announced the following principle with regard to "continuous treatment":

> "[3] Here Kossick must have discovered the grievous injury inflicted upon him very shortly after the administration of the enema on August 29,

1950. Although he could have begun a suit at that time, we do not say that for purposes of §2401(b) the two-year period began to run so soon. Courts have long since rejected the mechanical concept that in all cases the limitations period necessarily starts the very moment that a suit can be brought. See Note, Developments in the Law--Statutes of Limitations, 63 Harv.L.Rev. 1177, 1200, 1204, 1213-19 (1950). There is much good sense in Chief Justice Desmond's observation in the Borgia case that 'It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent * * *' 12 N.Y.2d at

156, 237 N.Y.S.2d at 321-322, and this is not altogether without application when as here the summons would be served on the United States Attorney. F.R.Civ.Proc. 4(d)(4). But the period when such considerations remained pertinent expired at the latest when Kossick was discharged after the last surgical attention to his injury in November 1952 and nothing more in the way of remedy could be accomplished. It would be unreasonable to postpone the beginning of the limitation period so long as Kossick exercised his statutory right to demand further treatment at the Hospital, 42 U.S.C. § 249--a period that will never expire so long as he is a seaman." (page 936)

For a recent case applying the Kossick "continuous treatment" rule, see: Accardi v. United States, 356 F Supp 218, 221 (SDNY 1973).

The Ninth Circuit in Ashley v. United States, 413 F 2d 490, 493 (9th Cir 1969) took exception to the Kossick "continuous treatment" rule:

> ". . .We disagree. The principle may have originated because it was thought that a private physician, knowing of his actionable mistake, might be able to conceal it from his patient or continuously to lull the patient into failing to institute suit within the ordinary time period. To apply such a rationale in this case would be unrealistically to imagine that a

government physician in a Veterans hospital would be able to conspire successfully with all other government phycians and medical attendants who direct their attention to patients such as Ashley." (Ashley at page 493).

The Third Circuit Court of Appeals in Tyminski v. United States, 481 F 2d 257 (1973) also rejected the proposition that continuous treatment should act as an alternative test for determining when a claim accrues under the Tort Claims Act:

". . .We reject this approach. We find no value in the contention that a person who knows of the existence of the acts upon which his claim for negligence in a medical malpractice case is based may nevertheless forestall bringing suit until the

> treatment for his injuries is complete . . ." (Tyminski, page 264, footnote 5).

See, also, Ciccarone v. United States, 486 F 2d 253, 257 (3d Cir 1973): ". . . it is the continued existence of the physician-patient relationship which tolls the statute of limitations. Once this personal, confidential relationship terminates, the patient must exercise diligence in seeking a remedy for any suspected wrongdoing on the part of his physician. . ."

The Seventh Circuit in Cooper v. United States, 442 F 2d 908, 919 (7th Cir 1971) pointed to the fact that the courts of appeals were in disagreement over the concept of "continuous treatment" and went on to decide the case using two rationales:

> "Even if the limitations period for the wrong complained of began as late as the termination of plaintiff's relationship with the Government (citation omitted),

the two-year period commenced running on his June 29, 1967 release from the Du Page County Jail to the Illinois state authorities. . ."

The Fifth Circuit in Philadelphia National Bank v. United States, 411 F 2d 747, 748 (5th Cir 1969) affirmed the dismissal of the trial court based upon the undisputed fact that the action was not commenced for more than two years after the marshall's custody was terminated and the vessel was turned over to the plaintiff which bid it in on foreclosure sale.

In the instant matter, the Petitioner alleged malpractice in January, 1966 when his x-ray was misread.

This negligence, Petitioner alleges, resulted in seven subsequent surgeries which otherwise would not have been necessary. The first surgery occurred on February 17, 1966 and the last surgery occurred in July, 1969.

A few weeks after Petitioner terminated

his treatment, he filed his Federal Tort Claim (August 15, 1969).

The rationale in Kossick, supra, that it would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent or on the United States Attorney, seems sound from a policy point of view.

Under the view expressed in Ashley, supra, the Petitioner, a veteran, would have to sue the United States of America for malpractice by its agents and employees while still undergoing curative treatment and surgery for the alleged negligence at a government facility.

Ashley, supra, took the view that once the patient knew of the negligence, that the statute would commence running regardless if treatment had been completed. See, also Tyminski, supra.

Ashley and those Circuits following the Ashley rationale talk in terms of the continued existence of the physician-patient relationship

which tolls the statute of limitations.

Most persons who find out that their doctor or hospital have been negligent will go elsewhere for curative treatment by choice. This is not always possible where the patient is a veteran without funds and who must, by necessity, remain at the veteran facility for the curative treatment.

In Kossick, the Court assumed that Kossick must have discovered the grievous injury inflicted upon him shortly after the enema on August 29, 1950. However, even with this knowledge, the Court commenced the statute of limitations when Kossick was discharged after the last surgical attention to his injury in November, 1952 and nothing more in the way of remedy could be accomplished.

The Circuits have confused "knowledge and curative treatment" with the "physician-patient relationship". Each is a separate and distinct doctrine based on different policy considerations.

This Court should grant certiorari to resolve the division of opinion and confusion presently existing in the courts of appeals.

II

NEGLIGENT OR INTENTIONAL MISREPRESENTATION TOLLS THE STATUTE OF LIMITATIONS

The Ninth Circuit has not squarely issued a decision as to whether negligent or intentional misrepresentation by a doctor or doctors will toll the statute of limitations under Title 28 §2401(b).

Hungerford v. United States, 307 F 2d 99 (9th Cir 1962) seems to state that due to the fiduciary duty involved, 28 U.S.C. §2680(h) regarding tort claims for misrepresentation and deceit in medical malpractice cases are not barred under the provisions of 28 U.S.C. 1346(b) and 2674.

If this is the case, certainly misrepresentation and deceit should not be allowed to bar Petitioner's claim until two years have elapsed

from the time Petitioner is told the true facts.

In the instant case, the Petitioner was never told the true facts by Government agents and employees -- he found out quite by accident in June, 1968 and thereafter filed his Federal Tort Claim on August 15, 1969, well within the two-year period.

The confusion is obvious from the trial judge's comments at page 165:

> The Court: Let's assume the statements were made and the statements were false. Does that just toll the statute?

In Toal v. United States, 438 F 2d 222 (2d Cir 1971) the Court, in a case very similar to Petitioner's, found that Toal had been prevented from learning any act of malpractice had occurred because of a doctor's assurances and the failure to file a notation in the records.

Rahn v. United States, 222 F Supp 775 (SDG 1963) has many factual similarities to the Petitioner's case.

The Court in Rahn held that the statute of limitations was tolled where a physician had concealed the facts showing negligence, and the statute of limitations began to run only when the facts were discovered.

Fravel v. Pennsylvania R. Co., 104 F Supp 84 (D.M. 1952) discussed misrepresentation as a ground to grant relief against a statute of limitations.

This High Court in Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 3 L Ed 2d 770, 79 S Ct 760 (1959) has held that the maxim that no man may take advantage of his own wrong has been applied frequently to bar inequitable reliance on statutes of limitations.

This Court has also used the term "blameless ignorance" to toll the statute of limitations under the Federal Employers' Liability Act. See, Urie v. Thompson, 337 U.S. 163, 69 S Ct 1018, 93 L Ed 1283 (1949).

Even in view of this impressive authority that negligent or intentional misrepresentation

tolls the statute of limitations under Title 28 §2401(b) and unrefuted testimony by Petitioner as to what he had been told by Government doctors (R. T. pages 57, 58, 64, 66, 85, 86, 93, 95, 108, 142, 143, 146), the Trial Judge made the following remark:

The Court: "What statements?"

(R.T. page 152).

See, also, Scarborough v. Atlantic Coast Line R. Co., 178 F 2d 253 (4th Cir 1949) where fraud was held to toll the statute of limitations.

It is submitted that intentional or negligent representations made to a patient regarding the patient's condition or diagnosis estops the Government from asserting the two year statute of limitations set forth in 28 U.S.C. 2401(b) until the patient is informed of his true condition and the correct diagnosis. The two year statute of limitations commences from that date.

CONCLUSION

This Court should examine the provisions of

the Federal Tort Claims Act dealing with the two year statute of limitations and apply equitable considerations which have the effect of tolling the statute for those periods of time when (1) a patient is undergoing continuous curative treatment and (2) while a patient has not been advised of his true condition.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

KIM H. PEARMAN
7080 Hollywood Boulevard
Hollywood, California 90028

Counsel for Petitioner

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIDNEY GREENBERG, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 73-2045 MEMORANDUM

[May 21, 1974]

On Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, HUFSTEDLER and WALLACE, Circuit Judges.

The district court's order dismissing Greenberg's medical malpractice action for failure to state a claim for which relief may be granted is affirmed. A claim based on the Federal Tort Claims Act is barred unless "begun within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b). "[U]nder federal law a claim for malpractice accrues against the government when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962). The district court's finding that Greenberg was aware, or should have been aware, of the alleged acts of malpractice more than two years prior to filing this claim is supported by the evidence and is not clearly erroneous.

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APPENDIX "A"